Supreme Court, U. S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE STATES OF ARIZONA, COLORADO, IDAHO, KANSAS, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, TEXAS, UTAH, WASHINGTON, AND WYOMING IN SUPPORT OF PETITIONERS

STATE OF ARIZONA
Ralph E. Hunsaker
Chief Counsel
Arizona Water Commission
222 North Central Avenue #800
Phoenix, Arizona 85004

STATE OF COLORADO
J. D. MacFarlane
Attorney General of Colorado
Richard Hennessey
Deputy Attorney General
1525 Sherman Street, Third Floor
Denver, Colorado 80203

STATE OF IDAHO
David H. Leroy
Attorney General of Idaho
State House
Boise, Idaho 83720

STATE OF KANSAS
Robert T. Stephan
Attorney General of Kansas
Bruce E. Miller
Chief, Litigation Division
Kansas Judician Center,
Second Floor
Topeka, Kansas 66612

STATE OF MONTANA
Mike Greely
Attorney General of Montana
Natural Resources Building
32 South Ewing
Helena, Montana 59601

STATE OF NEBRASKA
Paul L. Douglas
Attorney General of Nebraska
Judy K. Hoffman
Assistant Attorney General
State Capitol
Lincoln, Nebraska 68509

STATE OF NEVADA
Richard H. Bryan
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89701

STATE OF NEW MEXICO
Jeff Bingaman
Attorney General of New Mexico
Richard A. Simms
Special Asst. Attorney General
Department of Justice
State Capitol
Santa Fe, New Mexico 87503

STATE OF NORTH DAKOTA
Allen I. Olson
Attorney General of North Dakota
Murray Sagsveen
Assistant Attorney General
State Capitol
Bismarck, North Dakota 58505

STATE OF OKLAHOMA
Jan Eric Cartwright
Attorney General of Oklahoma
112 Capitol
Oklahoma City, Oklahoma 73105

STATE OF OREGON
James A. Redden
Attorney General of Oregon
Peter S. Herman
Senior Counsel
100 State Office Building
Salem, Oregon 97310

STATE OF SOUTH DAKOTA
Mark V. Meierhenry
Attorney General of South Dakota
Lawrence Kyte
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501

STATE OF TEXAS
Mark White
Attorney General of Texas
Douglas G. Caroom
Assistant Attorney General
P.O. Box 12548
Austin, Texas 78711

STATE OF UTAH
Robert B. Hansen
Attorney General of Utah
State Capitol
Salt Lake City, Utah 84114

STATE OF WASHINGTON
Slade Gorton
Attorney General of Washington
Charles B. Roe, Jr.
Senior Assistant Attorney General
Temple of Justice
Olympia, Washington 98504

STATE OF WYOMING
John D. Troughton
Attorney General of Wyoming
Jack D. Palma II
Senior Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002

QUESTION PRESENTED

Although the lower court's decision involves several other questions, this brief is confined to the following issue:

> Does the Corps of Engineers have jurisdiction to require a permit under Section 10 of the Rivers and Harbors Act of 1899 for state authorized water diversions, which neither obstruct navigation nor have substantial adverse impacts on navigable capacity.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7
A. Activities which neither obstruct navigation nor adversely affect navigable capacity do not come within the purview of the Corps of Engineers' jurisdiction under Section 10 of the Rivers and Harbors Act.	7
B. Assuming, arguendo, that Section 10 jurisdiction extends to some activities without regard to their impact on navigation, in the absence of any showing of substantial adverse impact on navigable capacity, the Corps of Engineers does not have jurisdiction under Section 10 to require a permit for a state authorized water diversion.	12
C. The Corps of Engineers does not have jurisdiction to require a Section 10 permit for a state authorized diversion in connection with a federal reclamation project authorized under the 1902 Reclamation Act, so long as the state authorization is not inconsistent with clear congressional directives concerning the project.	14
CONCLUSION	17

TABLE OF AUTHORITIES CITED

CASES — PAGES

Broder v. *Natoma Water and Min. Co.*, 101 U.S. 274 (1880) 2
California-Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935) 13
Kansas v. *Colorado*, 206 U.S. 46 (1906) 2, 3, 7, 8
Maricopa County M.W.C. Dist. v. *Southwest Cotton Co.*, 39 Ariz. 65, 4 P. 2d 369 (1931) 5
Morgan v. *Shaw*, 47 Ore. 333, 83 P.534 (1906) 5
Moyer v. *Preston*, 6 Wyo. 308 44 P. 845 (1896) 5
National Wildlife Federation v. *Alexander*, 613 F.2d 1054 (1979) .. 10
Sanitary District v. *United States*, 266, U.S. 405 (1925) 10, 11, 16
Sierra Club v. *Morton*, 400 F. Supp. 610 (N.D. Cal. 1975) 9
Sieber v. *Frink*, 7 Colo. 148, 2 P.901 (1883) 6
United States v. *California*, 438 U.S. 645 (1978) 2, 3, 13, 14, 15
United States v. *Republic Steel Corp.*, 362 U.S. 482 (1906) 11
United States v. *Rio Grande Dam Irrig. Co.*, 174 U.S. 690 (1899) 2, 3, 7, 14
Wisconsin v. *Illinois*, 278 U.S. 367 (1929) 8, 11

STATUTES, REGULATIONS AND ADMINISTRATIVE DECISIONS

Colo. Const., Art XVI. §§ 5 and 6 4
Reclamation Act of 1902, 32 Stat. 388 (1902), 43 U.S.C. § 371-421 (1970) 2, 7, 14, 15, 16
Rivers and Harbors Act of 1899, Section 10, 33 U.S.C. § 403 ..... 6, 7, 9, 12, 14, 16
34 Op. U.S. Att'y Gen. 410, 417-18 (1925) 9
Army Corps of Engineers Permit Programs Regulations, 33 C.F.R. § 322.3 9
42 Fed. Reg. 37122 et. seq., (July 19, 1977) 9

TEXTS

Comment, *Environmental Law: Ecology Held Valid Criterion for Denying Dredge and Fill Permit Under Section 10 Rivers and Harbors Act of 1899*, 1970 Duke L.J. 1239, 1243, n.25 11
D. Harrison and C. Woodruff, *Accommodations of the Appropriation Doctrine and Federal Goals Under Sections 208 and 404 of Public Law 92-500 and Section 10 of the Rivers and Harbors Act of 1899*, 22 Rocky Mtn. Min. L. Insti. 941 (1976) 4, 6, 8, 11
Dept. of Water Resources, *Delta Water Facilities*—Bulletin 76, 30 (Cal. July, 1978) 15
R. Dewsnup and D. Jensen, *A Summary Digest of State Water Laws* 31-32 (1973) 5, 6

No. 79-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE STATES OF ARIZONA, COLORADO, IDAHO, KANSAS, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, TEXAS, UTAH, WASHINGTON, AND WYOMING IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

The western states named herein as *amici curiae* all have comprehensive systems for the allocation and administration of water. Transformation of the West into an economically productive and socially inhabitable region has been due in significant part to the security afforded by water rights granted under state administrative and judicial procedures.

At an early stage in the development of western water law, indeed before many of the western states had been admitted into the Union, Congress deferred to local law. This Court in *Broder* v. *Natoma Water and Min. Co.,* 101 U.S. 274 (1880), observed that local appropriation rights were "rights which the government had, by its conduct, recognized and encouraged and was bound to protect." *Id.* at 276.

This congressional deference to state water law in the reclamation of the arid western lands has continued, and indeed, was strongly reaffirmed by this Court in its recent decision in *United States* v. *California,* 438 U.S. 645 (1978). There the Court stated:

> "The history of the relationship between the federal government and the states in the reclamation of the arid lands of the western states is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 653.

The Court went on to hold that the Secretary of Interior was bound by the Reclamation Act of 1902 to acquire water rights for a federal reclamation project from the State of California, and that further, California could impose any condition in that permit which is not inconsistent with clear congressional directives regarding the project.

In laying the background for its decision, the Court in *California* referred to its earlier decisions in *United States* v. *Rio Grande Dam and Irrig. Co.,* 174 U.S. 690 (1899), and *Kansas* v. *Colorado,* 206 U.S. 46 (1906). The Court discussed the *Rio Grande* case as follows:

> "In *United States* v. *Rio Grande Dam and Irrig. Co.,* . . . [t]he Court noted that there are two limitations to the States' exclusive control of its streams —reserved rights 'so far at least as may be necessary for the beneficial uses of the government property' and the navigation servitude. The Court, however,

> was careful to emphasize with respect to these limitations on the states' power that, except where the reserved rights or navigation servitude of the United States are invoked, the state has total authority over its internal waters. *'Unquestionably the state . . . has a right to appropriate its waters, and the United States may not question that appropriation, unless thereby the navigability of the* [*river*] *be disturbed.'* " 438 U.S. at 662. (emphasis added)

The Court cited *Kansas* v. *Colorado* for additional evidence of congressional deference to state water laws:

> "Similarly, in *Kansas* v. *Colorado,* 206 U.S. 46 (1906), the United States claimed that it had a right in the Arkansas River superior to that of Kansas and Colorado stemming from its power 'to control the whole system of the reclamation of arid lands.' The Court disagreed and held that state reclamation law must prevail . . . federal legislation could not 'overide state laws in respect to the general subject of reclamation.' " 438 U.S. at 663.

The Court in *Kansas* v. *Colorado* reiterated its earlier conclusions in the *Rio Grande* case recognizing the only two limitations on exclusive state jurisdiction over its waters, namely that of reserved rights, and the "power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States." 206 U.S. at 86.

The lower court has either disregarded or misread the long line of decisions by this Court, most recently reaffirmed in *United States* v. *California,* recognizing the primacy of state laws for the appropriation of waters. The Ninth Circuit court has determined that the Corps of Engineers may require a permit under Section 10 of the Rivers and Harbors Act for state authorized diversions for reclamation purposes, on the basis that such diversions amount "to an alteration or modification of the condition or capacity of [the] waters." This result follows,

according to the Ninth Circuit, without regard to the effect of the diversions on actual navigable capacity. Such a decision could have seriously adverse consequences for administration of state water rights in the western states.

The Ninth Circuit's rationale apparently applies to any diversion which would ultimately have some effect on the condition or flow of a navigable stream or lake. According to the Ninth Circuit, such an effect is "presumed" to constitute an obstruction to navigation for purposes of Section 10, and thus a Section 10 permit is required. It would follow that any diversion for consumptive use from a navigable stream or lake, and from any of its tributaries or upper reaches, would come within the purview of Section 10, regardless of the effect of the diversion on navigable capacity.

The right to initiate an appropriation by a diversion for beneficial use is protected under the constitutions of several of the western states. *E.g.* Colo. Const., Art XVI. §§ 5 and 6; D. Harrison and C. Woodruff, *Accommodations of the Appropriation Doctrine and Federal Goals Under Sections 208 and 404 of Public Law 92-500 and Section 10 of the Rivers and Harbors Act of 1899,* 22 Rocky Mtn. Min. L. Inst. 941 (1976). Once water has been diverted and applied to beneficial use, an appropriation is complete giving rise to a water right recognized as a vested property right. *Id.* at 978-79. The denial of a Section 10 permit would thus prevent the accomplishment of an essential prerequisite to the appropriation of water. *Id.* At the least, it would present significant delay, inconvenience and expense to water users, if Corps regulations were imposed with respect to work in connection with water diversions and impoundments and related structures.

The potential adverse impact of the Ninth Circuit's decision is compounded by the fact that the diversions in question first took place several years prior to the initiation of this litigation. If the Ninth Circuit's decision were followed, it would mean that numerous state water right holders in the West would be faced with the possibility that the diversions on

which they have relied for their farms, orchards, and businesses could be subjected to Section 10 jurisdiction, with the result that the diversions could be denied or limited on the basis of "public interest" criteria which did not exist at the time the diversions were initiated. Even in the absence of any demonstrated affect on navigation, there would be no guarantee of compensation for injury to private property rights. Based on the rationale of the Ninth Circuit, the government could argue that assertion of Section 10 jurisdiction was a legitimate exercise of regulatory authority under the Commerce Clause, and therefore no compensation was required.

In appropriation states the property right which arises when water is appropriated generally includes the right to change the point of diversion or place of use of water, provided no injury to other water rights results. *See id.* For a variety of reasons, it may become necessary to change the location or means of the diversion. Thus, an existing structure may need to be moved to a different location or extended further into the stream. Since Corps regulations do not exempt such work, a permit may be required under Section 10. Permit denial under such circumstances would deprive the water right holder of his ability to continue to divert and use the water he has lawfully appropriated. *Id.*

Another serious problem is the potential impact of the Corps permit program on pending projects which are dependent on the continued validity of "conditional" water rights acquired under state law. A conditional water right is obtained through action by the claimant evidencing his intent to appropriate water for beneficial use. Once this prerequisite has been satisfied, if the appropriation is completed with "reasonable diligence," the water right becomes "absolute" and its priority date relates back to the date on which the claimant's intent to appropriate was evidenced. *E.g., Maricopa County M.W.C. Dist.* v. *Southwest Cotton Co.,* 39 Ariz. 65, 4 P.2d 369 (1931); *Morgan* v. *Shaw,* 47 Ore. 333, 83 P.534 (1906); *Moyer* v. *Preston,* 6 Wyo. 308, 44 P. 845 (1896); R. Dewsnup and D. Jensen, *A Summary Digest of State Water Laws* 31-32 (1973).

Like water rights based on completed appropriations, conditional water rights are considered to be vested property rights. *See e.g. Sieber* v. *Frink,* 7 Colo. 148, 2 P.901 (1883); R. Dewsnup and D. Jensen, *supra* at 31.

The conditional decree concept was developed in recognition of the fact that a water diversion project requiring a large investment over a considerable period of time could not be justified without assurance that upon completion the priority date of the water right upon which the project depended would relate back to the date when the project commenced. There are numerous projects throughout the West which rely on conditional water rights. D. Harrison and C. Woodruff, *supra* at 980. If the rationale of the Ninth Circuit is accepted and Section 10 jurisdiction thus expanded, many of these conditional water rights would be threatened with the possibility that a permit for the construction of the diversion or impoundment structure essential for its water supply will be denied. *See id.*

That Congress intended no such results in enacting Section 10 of the Rivers and Harbors Act is clear from the language of the Act, its traditional administrative interpretation, and most importantly, the decisions of this Court. For this reason, and because of the potentially serious adverse consequences of the Ninth Circuit's decision, we urge this Court to reverse.

SUMMARY OF ARGUMENT

The language of Section 10 of the Rivers and Harbors Act of 1899, its administrative interpretation, and most importantly, the decisions of this Court, have made it clear that the Corps' jurisdiction does not extend to activities which neither obstruct navigation nor adversely affect navigable capacity. In view of the deference to state water laws granted by Congress both before enactment of the 1899 Act and since that time, it is also clear that Congress has not delegated to the Secretary of the Army and the Corps of Engineers the authority to require the State of California to obtain their approval for state authorized water diversions for reclamation purposes, in the absence of a

showing of substantial adverse affect on navigation or navigation capacity. This is especially so where the reclamation project is constructed pursuant to the 1902 Reclamation Act. In the absence of any inconsistency with congressional directives respecting the reclamation project, the Corps may not prohibit or condition the state authorized diversion for the project pursuant to Section 10. The Ninth Circuit's decision to the contrary should be reversed.

ARGUMENT

A. Activities which neither obstruct navigation nor adversely affect navigable capacity do not come within the purview of the Corps of Engineers' jurisdiction under Section 10 of the Rivers and Harbors Act.

In the case of *United States* v. *Rio Grande Dam and Irrig. Co.*, 174 U.S. 690 (1899), this Court construed the almost identical predecessor to Section 10. The issue was whether the Act conferred jurisdiction to prohibit a dam on the Rio Grande River at a site in New Mexico where the river was not navigable, on the basis that by diverting most of the flow of the river, the dam would interfere wih its navigable capacity downstream. The Court stated:

> "It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the U.S. which tends to destroy the navigable capacity of one of the navigable waters of the U.S., is within the terms of the prohibition. . . ." *Id.* at 708.

That the sole basis for asserting jurisdiction under Section 10 is the protection of navigation on the nation's waterways was reaffirmed in *Kansas* v. *Colorado,* 206 U.S. 46 (1906). The Court quoted at length from its earlier decision in *Rio Grande* and then stated:

> "It follows from this that if, in the present case, the national government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the government makes no such contention. On the contrary, it. . .nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability." *Id.* at 86.

This view of the jurisdictional scope of Section 10 was again reiterated by this Court in *Wisconsin* v. *Illinois,* 278 U.S. 367 (1929):

> "The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction." 278 U.S. at 413.

From these cases, it should be clear that unless the structure or work would create some kind of obstruction to navigation or navigable capacity, the Army Corps of Engineers has no authority under Section 10 to require a permit.

The Corps of Engineers has traditionally administered Section 10 consistently with this premise, so that the primary consideration in determining whether a permit should be issued has been whether the proposed structure or activity would adversely affect navigable capacity. D. Harrison and C. Woodruff, *supra* at 966.

The Attorney General expressed the following opinion in 1925 concerning the function of the War Department in relation to the purposes of the Act:

> "Unquestionably the War Department must take into account, in exercising its administrative discretion, the policy of Congress as disclosed by the statute. The function of the Department is to determine the facts and not the policies. In doing so you must be guided by the clear intention of Congress that navigable waters shall not be so diverted for local purposes as to injure the just rights of the whole people in the navigability of such waters." 34 Op. U.S. Att'y Gen. 410, 417-18 (1925).

Present Corps of Engineers regulations published in 1977 are particularly relevant in this case, since both the Tracy and Delta pumping plant diversions in question are "approximately two miles from navigable water." *Sierra Club* v. *Morton,* 400 F. Supp. 610 (N.D. Cal. 1975). The regulations provide in part:

> "(a) (1) Structures or work are in the navigable waters of the United States if they are within limits defined in 33 CFR part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) above, if these structures or work affect the course, location, or condition of the water body *in such a manner as to impact on the navigable capacity of the water body.* . . . 33 C.F.R. § 322.3.

Supplementary information accompanying the regulations explained as follows:

> ". . . . any work that is performed outside the limits of a navigable water which affects its navigable capacity may also require a Section 10 permit. *The 1899 Act was enacted to protect navigation and the navigable capacity of the nation's waters,* 42 Fed. Reg. 37122 et. seq., July 19, 1977) (emphasis added).

These regulations make it clear that the Corps itself interprets Section 10 to require more than a mere showing of some impact on the condition of the water body. Contrary to the Ninth Circuit's decision, Corps regulations require that the activity not only affect the condition of the water body, but that it affect it "in such a manner as to impact on the navigable capacity of the water body." In the absence of such an impact, no Section 10 permit is required.[1]

The Ninth Circuit spent little time on administrative interpretation, but instead misconstrued cases not on point and confused the plenary power of Congress over interstate commerce with the delegated authority of the Corps and the Secretary.

The Ninth Circuit places reliance on this Court's decision in *Sanitary District* v. *United States,* 266 U.S. 405 (1925) for the proposition that an effect on actual navigable capacity need not be established as a prerequisite to Section 10 jurisdiction. But as the Ninth Circuit opinion itself discloses, the Court

---

[1] An example of the application of the Corps' interpretation of Section 10 is discussed in *National Wildlife Federation* v. *Alexander,* 613 F.2d 1054 (D.C. Cir. 1980). Two county water management districts were constructing a 3.9 mile ditch designed to drain excess surface water into Devil's Lake in North Dakota. Flood waters passing through the channel would flow into Devil's Lake through a preexisting natural coulee. The channel would not encroach into the waters of the lake, although the Eighth Circuit Court found that it would likely raise the water level slightly. Although the Corp considered Devil's Lake as a navigable water of the United States, in the words of the court, the Corps "declined to exercise jurisdiction over the project because its regulations provided that the permit requirement in Section 10 would apply to work occurring outside the water itself only if it would affect the course, location, or condition of the water body in such a manner as to impact on the navigable capacity of the water body." 613 F.2d 1056. The circuit court did not decide whether the Corps' interpretation of its jurisdiction under Section 10 is correct, because it found that Devil's Lake was not a navigable water of the United States and therefore no Section 10 permit was required for the construction of the channel.

reviewed the large diversions from Lake Michigan by the Sanitary District of Chicago and noted "the obvious fact that so large a withdrawal would lower the levels of the lake and *the overwhelming evidence that it would affect navigation.*" *Id.* at 430 (emphasis added). The case thus provides no support for the Ninth Circuit's proposition that an impact on navigable capacity need not be demonstrated.

Curiously, the Ninth Circuit's opinion also cites the Court's decisions in *Wisconsin* v. *Illinois,* 278 U.S. 367 (1929), and *United States* v. *Republic Steel Corp.,* 362 U.S. 482 (1906), as support for its holding. These cases are uniformly cited by commentators as evidencing the fact that Section 10 deals with obstructions to navigation and navigable capacity. *E.g.* Comment, *Environmental Law: Ecology Held Valid Criterion for Denying Dredge and Fill Permit Under Section 10, Rivers and Harbors Act of 1899,* 1970 Duke L.J. 1239, 1243, n.25; D. Harrison and C. Woodreff *supra* at 966, n.56.

As noted previously, the Court in *Wisconsin* v. *Illinois* interpreted Section 10 to prohibit "unreasonable obstructions to navigation and navigable capacity." 278 U.S. at 413. The Court further concluded that the Secretary of Army's limited authority did not include the power to issue a permit merely to aid a sewage disposal project. *Id.* at 418.

In *United States* v. *Republic Steel Corp.* the trial court had found that the depth of Calumet River had been reduced by the discharge of industrial waste by the defendant to 17 feet in some places and 12 feet in others. The lower court also found that the river was used by vessels requiring a 21 foot draft. 362 U.S. at 483-84. On the basis of this evidence, this Court found an obstruction to navigable capacity within the meaning of Section 10. *Id.* at 485. As support for its holding, the Court cited its earlier decisions in *Wisconsin* v. *Illinois* and *Sanitary District* v. *United States,* and stated:

> "The teaching of those cases is that the term "obstruction" as used in Section 10 is broad enough

to include diminution of the navigable capacity of a waterway by means not included in the second or third clauses. In the *Sanitary District* case it was caused by lowering the water level. Here it is caused by clogging the channel with deposits of inorganic solids. *Each affected the navigable 'capacity' of the river.*" *Id.* at 489 (emphasis added).

B. Assuming, arguendo, that Section 10 jurisdiction extends to some activities without regard to their impact on navigation, in the absence of any showing of substantial adverse impact on navigation, the Corps of Engineers does not have jurisdiction under Section 10 to require a permit for a state authorized water diversion.

Even if we assume for purposes of argument that jurisdiction exists under Section 10 over some activities which affect the condition of navigable waters, regardless of the activity's effect on navigable capacity, such jurisdiction does not extend to state authorized diversions for reclamation purposes. In order to correctly understand the jurisdictional scope of Section 10 with respect to diversions authorized under state law for reclamation, it is necessary to appreciate the deference to state water laws granted by Congress both before enactment of the 1899 Rivers and Harbors Act and since that time.

In vast areas of the West rainfall is slight, and land is virtually worthless without an adequate supply of water. For these reasons, western water laws came to be based on beneficial use of water rather than correlative rights and the appropriation theory rather than the riparian. Under the appropriation approach the first to make a beneficial use of water is protected in that right to the extent of its use.

At the time these water laws developed, federal policy stressed disposition of the public domain by encouraging homesteading and settlement. By a series of Acts in 1866, 1870, and 1877, Congress legitimized the appropriation approach

practiced in the western states, and declared that the water on public lands was open to use, and water rights thereto were to be obtained under the laws of the states and territories. It was settled by this Court in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that even government patentees had only received land titles and had to acquire water rights in accordance with state law.

As federal activity in the western lands increased, Congress repeatedly included disclaimers in federal enactments of any effect upon or interference with state laws concerning the control, appropriation, use, or distribution of water, or any vested right acquired thereunder. Such a disclaimer preserving state control over reclamation was included in an 1897 federal reclamation act. This Court in its recent decision of *United States* v. *California*, 438 U.S. 645 (1978), discussed this provision which was proposed as a floor amendment. The Court stated:

> "It was clearly the opinion of a majority of the congressmen who spoke on the bill, however, that such an amendment was unnecessary except out of an excess of caution. According to Congressman Lacey, Chairman of the Committee on Public Lands, and a principal sponsor of the 1897 Act, the water through which the reclamation would be accomplished 'does not belong to the [federal] government. The reservoirs in which the water is stored belong to the government, but the water belongs to the states and will be controlled by them. The amendment proposed by the gentleman from Illinois relieves this measure from all possible doubt upon that subject. I think there could be no doubt anyhow, but this amendment takes away the possibility of any question being raised as to the right of the states and territories to regulate and control the management and the prices of the water.' " 438 U.S. at 661-62.

This Court then went on to note that "Congressman Lacey's statement found reflection in contemporaneous deci-

sions of this Court holding that, *with limited exceptions not relevant to reclamation,* authority over intrastate waterways lies with the states." *Id.* at 662 (emphasis added). The Court then discussed its holding in *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690 (1899), citing the following language:

> "Unquestionably the state . . . has a right to appropriate its waters, and the United States may not question that appropriation, unless thereby the navigability of the [river] be disturbed." 438 U.S. at 662.

The California Water Project represents a comprehensive scheme for the reclamation of the more arid regions of central, coastal and southern California. It consists of dams, canals, pumping plants and other facilities designed to generate power, provide flood control and transfer water. Both the pumping plants in question are central to this reclamation project. The limited exceptions to state control over water resources which this Court noted are not relevant to reclamation generally, are likewise not applicable to limit the state's authority in this case. In the absence of a showing of substantial adverse effect on navigation, Congress had not delegated to the Secretary of the Army and the Corps of Engineers the authority to require the State of California to obtain their approval for these diversions.

C. The Corps of Engineers does not have jurisdiction to require a Section 10 permit for a state authorized diversion in connection with a federal reclamation project authorized under the 1902 Reclamation Act, so long as the state authorization is not inconsistent with clear congressional directives concerning the project.

While the Ninth Circuit found congressional approval under Section 10 in various congressional funding authorizations for the Tracy Plant, it reached the issue by erroneously concluding that Section 10 jurisdiction extended to the diversion made by the plant. That this is not the case follows unequivocally from this Court's holding in *United States* v.

California, 438 U.S. 645 (1978). The Tracy Plant is part of the Central Valley Project authorized by the 1902 Reclamation Act, 32 Stat. 388 (1902), 43 U.S.C. §§ 371-421 (1970). In *California,* this Court made it clear that the Reclamation Act required the Secretary "to appropriate, purchase or condemn necessary water rights in strict conformity with state law." 438 U.S. at 665. Further, the Court stated:

> "Once the waters were released from the dam, their distribution to individual landowners would again be controlled by state law. As explained by Senator Clark of Wyoming, one of the principal supporters of the reclamation bill in the Senate, 'the control of the water after leaving the reservoirs shall be vested in the States and Territories through which such waters flow.'" *Id.* at 667.

This Court went on to hold in *California* that the state could impose any condition on the control, appropriation, use or distribution of water through a federal reclamation project that is not inconsistent with clear congressional directives respecting the project. *Id.* at 665, 667, 672.

Applications to appropriate unappropriated water for the Central Valley Project were originally filed with the state in 1927 and later assigned to the United States Bureau of Reclamation. Dept. of Water Resources, *Delta Water Facilities—Bulletin 76,* 30 (Cal. July, 1978). The Bureau also filed a number of additional applications in its own behalf. Commencing in 1959, the California State Water Rights Board held hearings on the principal applications for the CVP, including those to divert and redivert water from the Delta. *Id.* In 1961, that Board issued Decision 990 which ordered issuance of permits to the USBR but reserved jurisdiction to fix at a future date the requirements for salinity control in the Delta and the coordinated operation of the Central Valley Project and the State Water Project. *Id.*

The state's authority to authorize and condition the permits for the Tracy Pumping Plant diversion was clearly within its prerogatives under the Reclamation Act as construed by this Court in *California.* It is entirely inconsistent with this Court's decision to now assert that Section 10 jurisdiction applies. The result of the Court's rationale could mean that a state authorized diversion for a federal reclamation project could be prohibited, limited or conditioned by the Secretary of the Army and the Corps of Engineers.

In the process of reaching such a conclusion, the Ninth Circuit mistakenly relied on language in decisions by this Court recognizing the plenary power of Congress over navigation. Thus, the court quotes a portion of the decision in the *Rio Grande* case that "as to navigable waters nothing should be done to obstruct their navigability without the assent of the national government." The Court further cites language from the Court's decision in *Sanitary District* v. *United States,* 266 U.S. 405 (1925), that "there is no question that this power [to remove obstructions to interstate and foreign commerce] is superior to that of the states to provide for the welfare or necessities of their inhabitants."

It is clear that the federal government's power under the Commerce Clause could override state actions to promote reclamation. But the question which is paramount in this case is whether the Secretary and the Corps have been authorized by Congress in Section 10 of the Rivers and Harbors Act to prohibit or regulate activities, decisions concerning which it has deferred to the states under the Reclamation Act of 1902. It is submitted that the decisions of this Court clearly establish that no such authority exists.

To the contrary, this Court's holding in *California* was that the state may impose any condition in a water right permit respecting the use and distribution of water through a federal reclamation project "that is not inconsistent with clear congressional directives respecting *the project.* There has been no contention in this case that the permit issued to the Bureau of

Reclamation to divert water from the Delta through the Tracy Pumping Plant, or the conditions placed on that permit, are inconsistent with clear congressional directives respecting the Central Valley Project. Indeed, the Ninth Circuit concedes that "it is manifest from the legislative history that Congress was well aware of the Tracy Pumping Plant as part of the Central Valley Project, fully approved of it, and consistently encouraged its construction and *operation.*" Under such circumstances, Section 10 simply does not apply. The Ninth Circuit erred in holding to the contrary.

CONCLUSION

Decisions regarding the allocation of unappropriated water among competing demands have dramatic significance in the western states. In determining where water will be diverted and used, a decision is directly made as to the locale of future growth and community development. In addition, by allocating an amount of unappropriated water to a selected beneficial use, the supply available for competing uses also within the state's legitimate concern is reduced. These decisions although they will ultimately have import to some extent to the nation as a whole, have a significantly more profound effect on the development of the state, as they will shape the priorities for water uses between the states' farmers, cities and industries, and between these uses and competing environmental uses. Thus, determinations as to the use of water in the West involve a delicate and complex balancing of benefits and costs associated with each competing use of water and the area of use. In exercising this responsibility, the states have developed elaborate administrative machinery which insures that the public will be allowed to fully participate in appropriation hearings, and to provide information relating to competing water needs.

On the other hand, it is not realistic to assume that the Secretary of Army and the Corps of Engineers has a comparable level of interest regarding water management affairs, unassociated with navigation, within an individual state. Nor is

it realistic to assume that the Corps has the time or expertise to involve itself in state water management, even assuming an inclination to do so. Congress was undoubtedly influenced by these considerations of public policy in providing for state control of the acquisition, use and distribution of waters within its boundaries for purposes of reclamation.

The Ninth Circuit holding is contrary to what this Court described as the "purposeful and continued deference to state water law by Congress." Without regard to the legitimate purpose of Section 10 to protect the navigable capacity of the country's waterways, the Ninth Circuit raises the potential of federal encroachment into matters which Congress has wisely deferred to the states. In the process, the Ninth Circuit misconstrues or disregards the relevant decisions of this Court. We therefore urge the Court to reverse the Ninth Circuit's decision in this case.

Respectfully submitted,

STATE OF ARIZONA
Ralph E. Hunsaker
Chief Counsel
Arizona Water Commission
222 North Central Avenue #800
Phoenix, Arizona 85004

STATE OF COLORADO
J. D. MacFarlane
Attorney General of Colorado
Richard Hennessey
Deputy Attorney General
1525 Sherman Street, Third Floor
Denver, Colorado 80203

STATE OF IDAHO
David H. Leroy
Attorney General of Idaho
State House
Boise, Idaho 83720

STATE OF KANSAS
Robert T. Stephan
Attorney General of Kansas
Bruce E. Miller
Chief, Litigation Division
Kansas Judician Center,
Second Floor
Topeka, Kansas 66612

STATE OF MONTANA
Mike Greely
Attorney General of Montana
Natural Resources Building
32 South Ewing
Helena, Montana 59601

STATE OF NEBRASKA
Paul L. Douglas
Attorney General of Nebraska
Judy K. Hoffman
Assistant Attorney General
State Capitol
Lincoln, Nebraska 68509

STATE OF NEVADA
Richard H. Bryan
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89701

STATE OF OKLAHOMA
Jan Eric Cartwright
Attorney General of Oklahoma
112 Capitol
Oklahoma City, Oklahoma 73105

STATE OF OREGON
James A. Redden
Attorney General of Oregon
Peter S. Herman
Senior Counsel
100 State Office Building
Salem, Oregon 97310

STATE OF SOUTH DAKOTA
Mark V. Meierhenry
Attorney General of South Dakota
Lawrence Kyte
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501

STATE OF TEXAS
Mark White
Attorney General of Texas
Douglas G. Caroom
Assistant Attorney General
P.O. Box 12548
Austin, Texas 78711

STATE OF UTAH
Robert B. Hansen
Attorney General of Utah
State Capitol
Salt Lake City, Utah 84114

STATE OF NEW MEXICO
Jeff Bingaman
Attorney General of New Mexico
Richard A. Simms
Special Asst. Attorney General
Department of Justice
State Capitol
Santa Fe, New Mexico 87503

STATE OF WASHINGTON
Slade Gorton
Attorney General of Washington
Charles B. Roe, Jr.
Senior Assistant Attorney General
Temple of Justice
Olympia, Washington 98504

STATE OF NORTH DAKOTA
Allen I. Olson
Attorney General of North Dakota
Murray Sagsveen
Assistant Attorney General
State Capitol
Bismarck, North Dakota 58505

STATE OF WYOMING
John D. Troughton
Attorney General of Wyoming
Jack D. Palma II
Senior Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002